No. 91-1657

In The

Supreme Court of the United States

October Term, 1992

CHARLENE LEATHERMAN, ET AL.,

Petitioners,

vs.

TARRANT COUNTY NARCOTICS INTELLIGENCE AND COORDINATION UNIT, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENT CITY OF LAKE WORTH, TEXAS

TIM G. SRALLA

WAYNE K. OLSON*

Members of the Firm of:
FIELDING, BARRETT & TAYLOR
8851 Highway 80 West, Suite 300
Fort Worth, Texas 76116-6041
Telephone: (817) 560-0303
Facsimile: (817) 560-3953

Attorneys for Respondent City of Lake Worth, Texas

*Attorney of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether dismissal of an action brought pursuant to 42 U.S.C. § 1983 based upon a "heightened pleading" requirement is violative of Rule 8 of the Federal Rules of Civil Procedure or the Rules Enabling Act, 28 U.S.C. § 2072?

2. Whether dismissal of a complaint brought pursuant to 42 U.S.C. § 1983 against a municipality is proper, on the grounds that the complaint contains only conclusory allegations that track the elements of a cause of action, unaccompanied by any notice as to the facts upon which the claim is allegedly based?

3. Whether a plaintiff should be allowed to plead the existence of a governmental policy in conclusory terms in an action against a governmental entity under 42 U.S.C. § 1983, so as to eviscerate the governmental entity's immunity from suit, in contravention of the dictates of the Rules Enabling Act?

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STATUTES AND RULES INVOLVED

Rule 8 of the Federal Rules of Civil Procedure provides in pertinent part:

> **(a) Claims for Relief.** A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief. . . .
>
> **(e) Pleading to be Concise and Direct: Consistency.** (1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings or motions are required.
>
> **(f) Construction of Pleadings.** All pleadings shall be so construed as to do substantial justice.

The Rules Enabling Act, 28 U.S.C. § 2072, provides in pertinent part:

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right. . . .

STATEMENT OF THE CASE

Petitioners Charlene Leatherman and Kenneth Leatherman, individually and as next friends of Travis Leatherman (collectively referred to as the "Leatherman plaintiffs"), alleged, in their original petition filed in state district court in Tarrant County, Texas, *inter alia*, that Respondents Tarrant County Narcotics Intelligence and Coordination Unit ("TCNICU") and Tarrant County, Texas ("Tarrant County") violated their constitutional rights in connection with their alleged detention and arrest by Respondents and Respondents' search of their residence (the "Leatherman incident").

After removal of the case to the Northern District of Texas, Fort Worth Division, the district court considered a motion filed by these two Respondents pursuant to Rules 12(b)(6) and 56, FED. R. CIV. P., to dismiss the original complaint. The district court, the Honorable David O. Belew, Jr. presiding, dismissed the complaint for failure to "allege any custom, practice or usage from which a policy may be inferred," but later vacated the dismissal and provided the Leatherman plaintiffs with additional time to amend to cure the inadequacies.

In order to attempt to cure the deficiencies in their complaint, the Leatherman plaintiffs added as additional plaintiffs Gerald Andert, Kevin Andert, Kevin Lealos and Jerri Lealos, individually and as next friends of Travor and Shane Lealos, Pat Lealos, and Donald Andert (collectively referred to as the "Andert plaintiffs"). They also added as new defendants Tim Curry ("Curry") and Don Carpenter ("Carpenter"), in their official capacities as Director of TCNICU and Sheriff of Tarrant County,

respectively, the City of Lake Worth, Texas ("Lake Worth"), and the City of Grapevine, Texas ("Grapevine"). Petitioners alleged that the Andert plaintiffs' residence was subjected to a search by officers of TCNICU and Grapevine (the "Andert incident"), which was similar to the Leatherman incident. Petitioners added the Andert incident in an apparent attempt to show that the Leatherman incident was not an isolated incident, so as to establish the existence of a governmental policy of unreasonable searches by TCNICU and Tarrant County.

Regardless of whether the addition of the Andert incident suggests any policy by TCNICU or Tarrant County, it did not support such an allegation against Lake Worth, because there was no allegation that Lake Worth had any involvement in the Andert incident, which occurred in the City of Grapevine. The allegations as to Lake Worth stemmed solely from the Leatherman incident. With regard to Lake Worth, Petitioners' First Amended Complaint (the "Complaint") alleged in relevant part:

> The search of the Leathermans' home was planned and carried out by law enforcement officers employed by or under the control of Defendant TCNICU, Defendant Tarrant County and Defendant City of Lake Worth.

(Complaint Paragraph 17) Petitioners thereafter alleged that:

> the shooting of their family dogs on the occasion in question by agents of Defendant TCNICU, Defendant Tarrant County and Defendant City of Lake Worth, deprived them of their right to be secure in their effects against unreasonable

> seizure as protected by the Fourth Amendment to the United States Constitution.

(Complaint Paragraph 21) and that:

> the manner in which the search of their home was carried out by agents of Defendant TCNICU, Defendant Tarrant County and Defendant City of Lake Worth, deprived them of their right to be secure in their house against unreasonable searches as protected by the Fourth Amendment to the United States Constitution.

(Complaint Paragraph 22) The Complaint set forth absolutely no factual allegations regarding Lake Worth's alleged participation in any actions which allegedly constituted an invasion of the Leatherman plaintiffs' constitutional rights. Based solely upon the above allegations, the Leatherman plaintiffs asserted, in conclusory allegations only, that:

> Defendant City of Lake Worth is liable to [the Leatherman plaintiffs] pursuant to 42 U.S.C. § 1983 for the unreasonable seizure of Plaintiffs' effects, i.e., the unjustified shooting of Plaintiffs' dogs, as alleged in paragraph 21 of this First Amended Complaint. Specifically Plaintiffs allege that the actions of the agents of Defendant City of Lake Worth were undertaken under color of law; that Defendant City of Lake Worth failed to formulate and implement an adequate policy to train its officers on the proper manner in which to respond when confronted by family dogs when executing search warrants; and that in light of the duties commonly assigned to officers who execute search warrants, the need for additional or different training was so obvious that the conduct of Defendant City of

> Lake Worth by and through its official policymaker or policymakers, demonstrates a deliberate indifference to the Constitutional rights of persons likely to be affected by such failure to train. Plaintiffs further allege that the failure to train referred to in this paragraph was a substantial factor or cause of the violations alleged in paragraph 21.

(Complaint Paragraph 25) The Leatherman plaintiffs further asserted that:

> Defendant City of Lake Worth is liable to [the Leatherman plaintiffs] pursuant to 42 U.S.C. § 1983 for the unreasonable search of Plaintiffs' house as alleged in paragraph 22 of this First Amended Complaint. Specifically, Plaintiffs allege that the actions of the agents of Defendant City of Lake Worth were undertaken under color of State law; that Defendant City of Lake Worth failed to formulate and implement an adequate policy to train its officers on the Constitutional limitations restricting the manner in which search warrants may be executed; and that in light of the duties commonly assigned to officers who execute search warrants, the need for additional or different training was so obvious that the conduct of the City of Lake Worth by and through its official policymaker or policymakers, demonstrates a deliberate indifference to the Constitutional rights of persons likely to be affected by such failure to train. Plaintiffs further allege that the failure to train referred to in this paragraph was a substantial factor or cause of the violation alleged in paragraph 22.

(Complaint Paragraph 28) Petitioners made no other allegations as to Lake Worth in the Complaint.

TCNICU, Tarrant County, Curry, and Carpenter filed a motion to dismiss pursuant to Rule 12(b)(6) or, alternatively, for summary judgment, pursuant to Rule 56, and the district court, the Honorable John McBryde presiding, dismissed the Complaint as to all the defendants. The district court noted that Petitioners still had pled the existence of a custom or policy only in the most conclusory terms, and had not informed the Respondents as to what training policy the Respondents had allegedly failed to implement. The district court further noted that Petitioners failed to provide any allegation as to how the Respondents had been "deliberately indifferent" to the Petitioners' constitutional rights. For these reasons, the district court determined that dismissal was appropriate.

The district court also ruled that, assuming dismissal was not proper, summary judgment under Rule 56, FED. R. CIV. P., was appropriate, given that Petitioners had failed to come forward with any evidence whatsoever that any of the actions alleged to have been taken by the officers in question were taken because of the existence of governmental policy or custom.

Petitioners' defense to summary judgment was that they should be granted more time to discover the existence of such a policy. The district court was not persuaded by Petitioners' argument, ruling that Petitioners had been provided sufficient time for discovery, and that, in order to justify the initial filing of their action, they should have been able to identify some facts which would have warranted a conclusion that such a policy

existed, since that is one of the predicates to stating a valid action under 42 U.S.C. § 1983.

The United States Court of Appeals for the Fifth Circuit affirmed the judgment of the district court on the grounds that the Complaint failed to allege any specific facts to support Petitioners' claims that the Respondents had a policy of inadequate training, as required by the heightened pleading requirement adopted by the Fifth Circuit in civil rights actions. It expressly did not address the remainder of the reasons for the district court's dismissal.

SUMMARY OF THE ARGUMENT

The dismissal of Petitioners' cause of action as to Lake Worth should be upheld because the Complaint failed to meet the constraints of Federal Rule of Civil Procedure 8(a), either as applied by the Fifth Circuit utilizing the heightened pleading requirement applied in civil rights cases, or as applied in other cases.

The Complaint contained only a conclusory allegation that the actions complained of were taken pursuant to a policy of Lake Worth. The existence of a municipal policy which causes a constitutional deprivation is a necessary element of a claim under 42 U.S.C. § 1983 brought against a municipality. Without a showing of the existence of such a policy, a municipality enjoys not only immunity from liability, but also immunity from suit. Thus, the Complaint against Lake Worth was properly dismissed because the Complaint did not show the existence of such a policy.

The Fifth Circuit's holding does not conflict with Federal Rule of Civil Procedure 8(a) because Rule 8(a) expressly provides that a plaintiff must include in the complaint a statement of the claim showing that the plaintiff is entitled to relief. Merely including conclusory allegations tracking the elements of a cause of action does not show that a plaintiff is entitled to relief, and such conclusory allegations have consistently been held to be deficient under Rule 8 and subject to dismissal.

Nor does the Fifth Circuit's holding violate the Rules Enabling Act, 28 U.S.C. § 2072, because the Fifth Circuit's holding in no way abridges Petitioners' substantive legal rights. Rather, it simply applies procedural requirements placed upon a plaintiff for stating a cause of action under 42 U.S.C. § 1983. In fact, any result other than dismissal would have violated the Rules Enabling Act. Were Petitioners able to subject Lake Worth to suit without showing the existence of an unconstitutional policy, Lake Worth's substantive legal right to sovereign immunity would be destroyed, in direct contravention of the dictates of the Rules Enabling Act that no procedural rule may alter, abridge or modify substantive law.

ARGUMENT

1. Municipal liability under 42 U.S.C. § 1983 is limited to actions taken pursuant to municipal policy.

A municipality is liable under 42 U.S.C. § 1983 only when the municipality itself has violated a person's constitutional rights pursuant to an official policy statement,

ordinance, regulation or decision. *Monell v. Department of Social Services of New York*, 436 U.S. 658 (1978). Under *Monell*, recovery from a municipality is limited to acts "of the municipality." *Id.* at 694. A municipality may be held liable only for acts which it has officially sanctioned or ordered, not for isolated acts of misconduct, no matter how egregious. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986). Thus, a municipality may not be held liable under § 1983 unless a plaintiff establishes the existence of a municipal policy which is a moving force behind a constitutional violation. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 128 (1988); *City of Canton v. Harris*, 489 U.S. 378, 389 (1989). Based upon these established precedents, in order for Petitioners to state a claim against Lake Worth, they must adequately plead the existence of a specific policy adopted by Lake Worth which caused a constitutional deprivation.

2. The Complaint failed to show the existence of a municipal policy.

The Complaint failed to show the existence of a policy which had been formally adopted by or officially sanctioned or ordered by any policy makers of Lake Worth. Petitioners pled that the search of the Leatherman residence was planned and carried out by law enforcement officers employed by or under the control of Respondents TCNICU, Tarrant County and Lake Worth. Nowhere in the Complaint were there any allegations of actions which were allegedly carried out specifically by officers of Lake Worth. There are no allegations that Lake Worth's officers, as opposed to officers of TCNICU or

Tarrant County, entered and searched the Leathermans' residence. There are no specific allegations that Lake Worth's officers shot the Leathermans' dogs during the search. There are simply no allegations of any specific involvement by Lake Worth in the Leatherman incident.

Moreover, there was no showing of the existence of any municipal policy of Lake Worth. Instead, Petitioners stated in conclusory fashion only that Lake Worth failed to formulate and implement an adequate policy to train its officers and that this failure to train demonstrated deliberate indifference to the rights of persons likely to be affected by such failure to train. This is insufficient to state a cause of action based upon a failure to train.

This Court has specifically noted that there are only "limited circumstances" in which an allegation of failure to train can be the basis for liability under § 1983. *Harris*, 489 U.S. at 387. Inadequate police training "may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *Id.* at 388. Plaintiff has attempted to state a cause of action against Lake Worth by quoting the above language verbatim from this Court's decision in *Harris*. The use of such conclusory generalities based upon a single isolated incident of harm does not sufficiently allege a policy based upon a failure to train. Rather, the necessary requisites to establish the existence of a policy of inadequate training were established by this Court in *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985). In *Tuttle*, this Court specifically rejected the premise that a municipal policy imputing liability could be inferred from a single isolated act by a police officer. Yet Petitioners attempted to do just that – they

sought to create an *inference* that a single isolated incident constitutes a municipal policy of inadequate training. Nowhere in their pleadings did Petitioners allege any other incidents which could have formed the basis for Lake Worth's purported policy of failure to train its officers on the proper method of search or the proper method of handling an encounter with dogs.[1] This Court's decision in *Harris* that a municipality may be liable for deliberate indifference does not overrule or modify the conclusion in *Tuttle* that "where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the 'policy' and the constitutional deprivation." *Tuttle*, 471 U.S. at 824.

Further, the Complaint failed to allege that the asserted "policy" reflected a deliberate or conscious choice by the policy makers of Lake Worth. "Municipal liability under § 1983 attaches where – and only where – a deliberate choice to follow a course of action is made from among various alternatives by the city policy makers." *Harris*, 489 U.S. at 389. This is consistent with the holding that an unjustified shooting by a police officer, without more, does not result from official policy. In

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[1] As stated previously, in the Complaint Petitioners added a separate and distinct incident (the Andert incident) involving the Grapevine Police Department, apparently in an attempt to show the existence of a policy. The Complaint, however, clearly acknowledges that no Lake Worth officers were present or participated in the Andert incident, and therefore, the Complaint as to Lake Worth only states a single isolated incident.

so holding, the *Tuttle* court noted that "it is therefore difficult in one sense even to accept the submission that someone pursues a 'policy' of 'inadequate training,' unless evidence be adduced which proves that the inadequacies resulted from conscious choice – that is, proof that the policymakers deliberately chose a training program which would prove inadequate." *Tuttle*, 471 U.S. at 823. Though the *Tuttle* court was referring to proof and not pleading, the same logic applies, so that a plaintiff is required to at least plead that there was more than one incident, and to allege how such incidents were attributable to a policy of a failure to train, in order to give a municipal defendant fair notice of how it is allegedly liable for conduct which otherwise would be insufficient to state a claim against the municipality. This is true in particular because, as discussed below, in the absence of a properly pled municipal policy, a city is entitled to sovereign immunity, including immunity from suit.

3. Municipalities are entitled to sovereign immunity from § 1983 lawsuits in the absence of the existence of a municipal policy.

In *Monell*, this Court stated, "Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies." *Monell*, 436 U.S. at 690. The Court therefore concluded that local governing bodies may be sued under § 1983 where " . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or

decision officially adopted and promulgated by that body's officers." *Id.* at 690. Municipal liability under *Monell* is thus limited to actions of a municipality taken pursuant to "policy" or "custom." Nowhere in *Monell* did this Court abrogate the doctrine of common law sovereign immunity as it applied to municipalities at the time the Civil Rights Act was adopted in 1871.

The application of common law immunity defenses to § 1983 causes of action against municipalities was discussed by this Court in *Owen v. City of Independence*, 445 U.S. 621 (1980). The *Owen* court noted that principles of common law immunity had been recognized and upheld in civil rights challenges brought against legislators, *Tenney v. Brandhove*, 341 U.S. 367 (1951), and judges and police officers, *Pierson v. Ray*, 386 U.S. 547 (1967). *Owen*, while denying municipalities a *qualified immunity* defense based upon the good faith of its officers, indicated that in the absence of a municipal policy, no waiver of common law immunities would occur. The *Owen* court noted that:

> [n]otwithstanding § 1983's expansive language and the absence of any express incorporation of common-law immunities, we have, on several occasions, found that a tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that Congress would have specifically so provided had it wished to abolish the doctrine. *Pierson*, 386 U.S. at 555. Thus in *Tenney v. Brandhove, supra*. . . . we concluded that Congress 'would [not] impinge on a tradition so well grounded in history and reason by covert inclusion in the general language' of § 1983. . . .

> Where the immunity claimed by the defendant was well established at common law at the time § 1983 was enacted, and where its rationale was compatible with the purposes of the Civil Rights Act, we have construed the statute to incorporate that immunity.

445 U.S. 621, 637-638 (quoting *Tenney v. Brandhove*, 341 U.S. at 376). As discussed below, the doctrine of sovereign immunity, as applied to a municipality's governmental functions, was well established at the time of the Civil Rights Act of 1871.

Early on in the American judicial system, it was recognized that the "well settled" common law did not allow suit against a municipality: "[Municipal] corporations, created by the legislature for purposes of public policy, . . . by the common law, . . . are not liable to an action for . . . neglect unless the action be given by some statute. *Mower v. Inhabitants of Leicester*, 9 Mass. 247, 250 (1812). *See also, Brown v. Inhabitants of Vinalhaven*, 65 Me. 402, 403 (1876) (the general rule is that municipal corporations are not liable to a suit except when the right of action is given by statute). Under this doctrine of common law immunity, municipalities were deemed to be public corporations which constituted "a part of the government of the country." *City of Richmond v. Long's Adm'rs.*, 17 GRATT. 375, 378 (Va. 1867). In holding that a demurrer should have been granted in favor of the city on the grounds of sovereign immunity, the *Long's Adm'rs.* court noted:

> The legislature of the state has thus chosen to impart to this corporation the highest attributes and functions of political sovereignty, so that it

> is 'imperium in imperio,' and may be aptly termed in the language of Judge Marshall already quoted, 'a legislative corporation, established as a part of the government of the country.' It cannot be denied that it is as well a municipal government as a municipal corporation.

17 GRATT. at 383 (quoting *Fowle v. Common Council of Alexandria*, 3 Pet. U.S.R. 398). State courts during this era routinely dismissed civil rights and other causes of action against municipalities on demurrer or similar motions on the basis of governmental immunity. *See, e.g., Harrison v. City of Columbus*, 44 Tex. 418 (1876); *City of Corsicana v. White*, 57 Tex. 382 (1882); *Western College of Homeopathic Medicine v. City of Cleveland*, 12 Ohio St. 375 (1861); *Sutton & Dudley v. Board of Police of Carroll County*, 41 Miss. 236 (1866); *Hayes v. City of Oshkosh*, 33 Wis. 314 (1873); *Reock v. Mayor and Council of Newark*, 33 N.J.L. Reports 129 (1868). Other state court decisions interpreted the doctrine of sovereign immunity to prohibit causes of action against a municipality based on the acts of its officers. *Fox v. The Northern Liberties*, 3 Watts & S. 103 (Pa. 1841); *Wheeler v. City of Cincinnati*, 19 Ohio St. 19 (1869). Thus in *Fox*, the Pennsylvania Supreme Court noted:

> [N]or is it conceivable how any blame can be fastened upon a municipal corporation, because its officer, who is appointed or elected for the purpose of causing to be observed and carried into effect the ordinances duly passed by the corporation for its police, either mistakenly or wilfully, under colour of his office, commits a trespass; for in such case it cannot be said, that the officer acts under any authority given to

him, either directly or indirectly by the corporation . . .

Fox, 3 Watts & S. at 106.

A century later, but consistent with these authorities, the *Owen* court specifically noted that "the common law immunity for governmental functions is thus more comparable to an *absolute immunity from liability* for conduct of a certain character, *which defeats a suit at the outset*, than to a qualified immunity, which depends upon the circumstances and motivations of [the official's] actions, as established by the evidence at trial." 445 U.S. at 647, n.29 (citing *Imbler v. Pachtman*, 424 U.S. 409, 419 n.13 (1976)) (emphasis added).

This Court followed the logic espoused in *Owen*, *Tenney* and *Pierson* when it rendered its landmark opinion in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), holding that government officials generally are shielded from liability in civil rights lawsuits insofar as their conduct does not violate clearly established law. *Harlow* and its progeny clearly recognize that significant policy considerations exist for not subjecting government officials entitled to qualified immunity to the costs, burdens and fears of being sued. As a basis for these rulings, this Court has emphasized that good faith immunity embraces not only a defense to personal liability, but also an "immunity from suit." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). The conclusions in *Harlow* and *Mitchell* that mere allegations of wrongdoing will not defeat a claim of good faith immunity and that qualified immunity includes immunity from suit, are similar to this Court's recognition in *Monell* that "a local government *may not be sued* under

§ 1983" unless the unconstitutional deprivation can be attributed to municipal policy. *Monell*, 436 U.S. at 694 (emphasis added). *Owen* likewise acknowledged that sovereign immunity for a municipality is immunity from suit, except to the extent that such immunity has been abrogated by the adoption of § 1983. The *Owen* majority specifically noted that "the public will be forced to bear only the costs of injury inflicted by the 'execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy.' " 445 U.S. at 657 (citing *Monell*, 436 U.S. at 694).

4. The Fifth Circuit's application of a "heightened pleading" requirement under Rule 8 is appropriate in cases such as the one at bar.

Based upon the above precedents, Petitioners were required to plead facts sufficient to show a waiver of Lake Worth's governmental immunity. The Fifth Circuit analyzed Petitioners' "bare bones" statements and determined that they were, at best, mere conclusory allegations which were not sufficient to sustain a § 1983 cause of action against Lake Worth. In so doing, the Fifth Circuit applied a "heightened pleading" standard. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 954 F.2d 1054 (5th Cir. 1992). Under Fifth Circuit authority, a complaint against a municipality must specifically identify: (1) a policy (2) of the city's policymaker (3) that caused (4) the plaintiff to be subjected to a deprivation of a constitutional right. *Palmer v. City of San Antonio*, 810 F.2d 514 (5th Cir. 1987). This

standard is in accordance with Supreme Court precedent. "It is only when the execution of [the] government's policy or custom . . . inflicts the injury that the municipality may be held liable under § 1983." *City of Springfield v. Kibbe*, 480 U.S. 257, 267 (1987) (O'Connor, J., dissenting) (quoting *Monell*, 436 U.S. at 694). Even assuming *arguendo* that Petitioners' allegations were sufficient to allege specific acts by the police officers of Lake Worth, under *Tuttle*, the Fifth Circuit has properly held that where a lawsuit brought against a municipality is predicated on inadequate training of its police officers, there has to be shown at least a pattern of similar incidents in which citizens were injured in order to establish the official policy requisite to impose municipal liability under § 1983. *Palmer*, 810 F.2d at 518. Since Petitioners only alleged that Lake Worth police officers were involved in a single incident, and since there was no other allegation supporting the existence of a policy, the minimum requirements for stating a claim clearly were not met.

Petitioners' argument that the Fifth Circuit's "heightened pleading" requirement violates Rule 8 has no merit. The Fifth Circuit rule is consistent with precedents of all other circuit courts of appeals. Whether they have articulated the rule as a "heightened pleading" standard, or simply as application of the requirements of Rule 8, all of the circuits have applied a similar pleading requirement in civil rights cases. *See, e.g., Siegert v. Gilley*, 895 F.2d 797 (D.C. Cir. 1990), *aff'd*, 111 S. Ct. 1789 (1991) (adopting heightened pleading requirement); *Fisher v. Flynn*, 598 F.2d 663 (1st Cir. 1979) (civil rights complaints must do more than state simple conclusions); *Spear v. Town of West*

Hartford, 954 F.2d 63 (2nd Cir. 1992) (civil rights complaints containing only bare assertions that are conclusory and speculative will be dismissed); *Hall v. Pennsylvania State Police*, 570 F.2d 86 (3rd Cir. 1978) (complaint must be sufficiently precise to give notice of claims asserted); *Collinson v. Gott*, 895 F.2d 994 (4th Cir. 1990) (adopting heightened pleading requirement); *Elliott v. Perez*, 751 F.2d 1472 (5th Cir. 1985) (adopting heightened pleading requirement); *Nuclear Transport & Storage, Inc. v. United States*, 890 F.2d 1348 (6th Cir. 1989) (adopting heightened pleading requirement); *Rakovich v. Wade*, 850 F.2d 1180 (7th Cir.), *cert. denied*, 488 U.S. 968 (1988) (mere conclusory allegations are insufficient to state claim); *Arnold v. Jones*, 891 F.2d 1370 (8th Cir. 1989) (adopting heightened pleading requirement); *Branch v. Tunnell*, 937 F.2d 1382 (9th Cir. 1991) (adopting heightened pleading requirement); *Pueblo Neighborhood Health Centers, Inc. v. Losavio*, 847 F.2d 642 (10th Cir. 1988) (adopting heightened pleading requirement); *Arnold v. Board of Education*, 880 F.2d 305 (11th Cir. 1989) (Rule 8 is applied more rigidly to claims alleging official policy or custom of a local government). Each of these cases reflects the recognition that stricter pleading and proof requirements are inherently necessary to fulfill the substantive legal purposes of absolute and qualified immunity defenses.

A heightened pleading requirement is also consistent with this Court's holdings. For example, a heightened pleading requirement has been applied to § 1983 qualified immunity defenses pursuant to this Court's rulings in *Harlow* and *Anderson v. Creighton*, 483 U.S. 635 (1987), recognizing the applicability of "objective" immunity tests in order to protect governmental officials from the

burdens of trial and litigation. *See, e.g., Elliott v. Perez*, 751 F.2d 1472 (5th Cir. 1985); *Siegert v. Gilley*, 895 F.2d 797 (D.C. 1990). The justifications for protecting individual officers entitled to qualified immunity from costs and burdens of unfounded lawsuits are equally applicable to governmental entities entitled to absolute immunity. As noted in Justice Powell's dissent in *Owen*, a paralysis of governmental decision-making may occur if responsible local officials, concerned about potential judgments against their municipalities for alleged constitutional torts, must look over their shoulders at strict municipal liability for unknowable constitutional violations. 445 U.S. at 668-69. With the tremendous costs and burdens of defending civil rights litigation, the same result will likely occur even though the plaintiff's allegations may ultimately be adjudged to be without merit.

The heightened pleading requirement adopted by the Fifth Circuit simply enforces these policy considerations by ensuring that lawsuits brought against governmental entities entitled to sovereign immunity from suit have some viable basis supported by factual averments. Just as in cases of qualified immunity, where a mere conclusory allegation of bad faith is not sufficient to defeat a government official's qualified immunity, a complaint against a governmental entity must meet a simple basic threshold in order to state a claim under § 1983 – specifically, a factual predicate supporting the alleged existence of a municipal policy. *Rodriguez v. Avita*, 871 F.2d 552 (5th Cir.), *cert. denied*, 493 U.S. 854 (1989). To adopt any other rule would eviscerate the immunity from suit that governmental entities have under the law, because a plaintiff could simply file a complaint alleging the existence of a

policy, without any factual basis supporting the existence of such a policy, in the blind hope of discovering through suit some evidence upon which to base a claim or of exacting a settlement from a city desiring to avoid the costs of litigation. Such a result is inconsistent with the existence of sovereign immunity.

It is also inconsistent with this Court's previously adopted position that a claim against a municipality is not established "by merely alleging that the existing training program for a class of employees, such as police officers, represents a policy for which the city is responsible." *Harris*, 489 U.S. at 389. For liability to attach, the "*identified deficiency* in a city's training program must be closely related to the ultimate injury." *Id.* at 391 (emphasis added). Under *Harris*, a cause of action for "inadequate training" should inherently require pleading and proof of three basic elements:

> 1) A showing of how the alleged "policy" is inadequate to protect against the deprivation of a constitutional right;
>
> 2) A showing that the governmental entity's policy makers deliberately or consciously sanctioned the inadequate policy because they knew that it was inadequate in the manner alleged and they acted with conscious indifference to whether the policy would deprive citizens of a constitutional right; and
>
> 3) A showing that the constitutional deprivation was actually caused by the deficiency in training and that the injury would not have occurred under an adequate training program.

Under this test, the pleading of a factual basis supporting a theory of "conscious indifference" is necessary to sustain a claim of municipal liability. Petitioners wholly failed to meet this burden in that they failed to plead what Lake Worth's policy on training was or how it allegedly violated their constitutional rights. Until this threshold is crossed, no issue has been raised as to whether Lake Worth's policy makers (whose identity Petitioners have also failed to plead) acted with conscious indifference to the rights of citizens or whether such indifference was a moving force behind the injury.

5. Application of the "heightened pleading" requirement is not necessary to sustain dismissal of Petitioners' claim against Lake Worth.

Even assuming that application of a "heightened pleading" requirement is not warranted, dismissal of the Complaint against Lake Worth was still appropriate. Rule 8 generally allows "notice pleadings," but Rule 8 still requires a party to plead some facts in support of their alleged claim. Numerous courts of appeals have addressed this issue, and virtually all are in agreement that the liberality of the federal rules do not eliminate the need for a plaintiff to plead his case sufficiently. Moreover, these courts have so reasoned without any application of a "heightened pleading" standard. For example, the First Circuit has recognized that although Rule 8 allows "notice pleading," it does not relieve a plaintiff from providing some showing of the basis for its claim. *Dartmouth Review v. Dartmouth College*, 889 F.2d 13 (1st Cir. 1989). In so ruling, the court noted that the liberal

provisions of Rule 8 are still subject to the dictates of Rule 12(b)(6):

> We have repeatedly cautioned that, notice pleadings notwithstanding, Rule 12(b)(6) is not entirely a toothless tiger. "[M]inimal requirements are not tantamount to nonexistent requirements. The threshold [for stating a claim] may be low, but it is real . . . " [citation omitted]. Thus, plaintiffs are obliged to set forth in their complaint factual allegations, either direct or inferential, regarding each material element necessary to sustain recovery under some actionable legal theory. [citation omitted]

Id. at 16.

Similarly, the Seventh Circuit has held in a civil rights action brought under § 1983 that while courts must construe pleadings liberally, and mere vagueness or lack of detail does not warrant dismissal, the lack of intimation of any facts supporting the existence of a municipal policy, custom or usage justifies dismissal. The court noted that mere legal conclusions of liability and the existence of a municipal policy will not suffice to comply with Rule 8. *Strauss v. City of Chicago*, 760 F.2d 765, 767-68 (7th Cir. 1985). In so holding, the court expressly elected not to apply a heightened pleading standard, stating: "We do not mean to imply that a plaintiff must plead in greater detail, but merely that the plaintiff must plead some fact or facts tending to support his allegation that a municipal policy exists that could have caused his injury." *Id.* at 769.

It is clear that the courts' reasoning in *Dartmouth* and *Strauss* were not based upon the fact that they were civil

rights cases, because similar analysis has been consistently applied in other types of cases. For example, the Sixth Circuit affirmed dismissal under Rule 8(a) of a cause of action brought pursuant to the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6972, 6973 and the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9606, 9607(a). *McGregor v. Industrial Excess Landfill, Inc.*, 856 F.2d 39 (6th Cir. 1988) (per curiam). In so holding, the court noted that the plaintiffs had alleged that they had incurred certain "response costs," a necessary predicate to an action under CERCLA. The Sixth Circuit rejected the plaintiffs' argument that this was a sufficient pleading under Rule 8(a), noting that Rule 8(a) at least requires that the plaintiff include a short and plain statement of the claim showing that the pleader is entitled to relief, and that this requires that the plaintiff give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. The court stated that implicit in this requirement is a statement of the circumstances, occurrences and events upon which the claim is based. The court pointed out that the plaintiffs' complaint failed to allege any factual basis for the conclusory allegation that they had incurred response costs, and accordingly affirmed the dismissal.

Likewise, the Seventh Circuit has stated that, despite the liberality of modern rules of pleading, a complaint still must contain allegations of fact, direct or inferential, respecting all of the elements of the plaintiff's claim. *Sutliff, Inc. v. Donovan Companies, Inc.*, 727 F.2d 648, 654 (7th Cir. 1984). The court added:

> And the pleader will not be allowed to evade this requirement by attaching a bare legal conclusion to the facts that he narrates: if he claims an antitrust violation, but the facts he narrates do not at least outline or adumbrate such a violation, he will get nowhere merely by dressing them up in the language of antitrust.

Id. at 654. *See also, Tamari v. Bache & Co. (Lebanon) S.A.L.*, 565 F.2d 1194, 1198 (7th Cir. 1977), *cert. denied*, 435 U.S. 905 (1978); and *Challenger v. Local Union No. 1 of Intern. Bridge, Structural, and Ornamental Iron Workers, AFL-CIO*, 619 F.2d 645, 648-49 (7th Cir. 1980). In *Challenger*, the court determined that allegations that the defendants had breached their fiduciary duties, which allegations were being used to support a cause of action under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1381, were insufficient and warranted dismissal. The court noted that the bald conclusion that the defendants had breached their fiduciary duty was insufficient, because a motion to dismiss admits allegations of fact, but not legal conclusions. *Challenger*, 619 F.2d at 649.

The Ninth Circuit has also adopted a similar position regarding the proper construction of Rule 8. For example, in a case wherein the plaintiffs sought a declaratory judgment rendering the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1782, unconstitutional, the court affirmed dismissal under Rule 12(b)(6), stating that the court will not presume the truth of a legal conclusion in the complaint, and that the plaintiff is required to plead factual allegations in support of its claim. *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir.), *cert. denied*, 454 U.S. 1031 (1981). *See also, Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 735-36 (9th Cir. 1987).

The Tenth Circuit has construed Rule 8 in the same fashion, noting that on a motion to dismiss, facts that are well pleaded are taken as correct, but allegations of conclusions or of opinions are not sufficient when no facts are alleged to support them. *Bryan v. Stillwater Board of Realtors*, 578 F.2d 1319, 1321 (10th Cir. 1977). *See also, Mitchell v. King*, 537 F.2d 385, 386 (10th Cir. 1976).

In none of these cases did the courts' holdings turn on application of a "heightened pleading" requirement. Instead, the courts were guided by the language of Rule 8 itself, which imposes a duty on the plaintiff to include in the Complaint a short and plain statement of the claim *showing* that the pleader is entitled to relief. Petitioners' pleadings in this case did not show that they were entitled to relief. Instead, Petitioners did nothing more than track the verbatim language from one of this Court's prior cases enumerating the prerequisites for bringing a § 1983 claim. As previously pointed out, Petitioners alleged no facts supporting the passage or implementation of a policy, and also failed to allege any series of incidents involving Lake Worth which could arguably have supported an inference of the existence of a municipal policy. Thus, they accorded Lake Worth absolutely no notice whatsoever as to the nature of the claim, and failed to comply with the minimum dictates of Rule 8.

Petitioners argue that requiring them to plead in nonconclusory terms is inconsistent with this Court's decision in *Conley v. Gibson*, 355 U.S. 41 (1957). This is not so. Indeed, these same courts of appeals have consistently evidenced their consideration of *Conley*, and have noted this Court's careful analysis that the Rules of Civil Procedure:

> [d]o not require a claimant to set out *in detail* the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is *and the grounds upon which it rests.*

Conley, 355 U.S. at 47 (emphasis added). *See, e.g*, *Strauss*, 760 F.2d at 767-68; *Dartmouth*, 889 F.2d at 16. This Court's discussion in *Conley* has been virtually universally interpreted to require a court to accept all well-pled factual averments as true, and draw all reasonable inferences therefrom in a plaintiff's favor. In so doing, however, the courts must eschew any reliance on bald assertions, unsupportable conclusions, and opprobrious epithets. *Dartmouth*, 889 F.2d at 16; *Chongris v. Board of Appeals*, 811 F.2d 36, 37 (1st Cir.), *cert. denied*, 483 U.S. 1021 (1987) (quoting *Snowden v. Hughes*, 321 U.S. 1, 10 (1944)).

Decisions of this Court since *Conley* also indicate that Rule 8 does not eliminate the need for a plaintiff to come forward with at least a minimal showing of factual support for a claim. For instance, this Court has stated in an antitrust case that the liberal pleadings rule stated in *Conley* can perhaps be stretched too far, and that, at least in a case of great magnitude, "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Associated Gen. Contractors v. California State Council*, 459 U.S. 519, 528 n.17 (1983). Similarly, in affirming a dismissal for lack of standing in an exclusionary zoning case, this Court noted that the plaintiffs had alleged only in conclusory terms that they were among the persons excluded by the defendants' actions. *Warth v.*

Seldin, 422 U.S. 490 (1975). Such conclusory statements were held insufficient. Instead, the Court stated:

> [P]etitioners must allege facts from which it reasonably could be inferred that, absent the respondents' . . . practices, there is a substantial probability that they would have been able to purchase or lease in Penfield . . . We find the record devoid of the necessary allegations.

Id. at 504.

> We hold only that a plaintiff who seeks to challenge . . . practices must allege specific, concrete facts demonstrating that the challenged practices harm *him*, and that he personally would benefit in a tangible way from the court's intervention.

Id. at 508.

In yet another case, this Court has held that a plaintiff cannot meet his burden under Federal Rule of Civil Procedure 35 (authorizing physical examination of a party) by making conclusory allegations. Rather, this Court held the rule required a plaintiff to plead facts, and that the requirements of the rules are not met by mere conclusory allegations. *Schlagenhauf v. Holder*, 379 U.S. 104, 118 (1964). Thus, this Court has recognized that some facts supporting a plaintiff's claim must be pleaded, and that "pleadings must be something more than an ingenious academic exercise in the conceivable." *Warth*, 422 U.S. at 509.

The requirement that Petitioners must plead basic facts supporting the Complaint is also confirmed by the form complaints drafted by the Advisory Committee on the Federal Rules. For example, Form 9, a form complaint

for a negligence action, suggests inclusion of specific facts supporting a claim, including the date and location of the accident, a brief description of the accident itself, and articulation of the types of injuries suffered by the plaintiff. Thus, the form requires that the defendant be provided with factual support for the elements of the plaintiff's claim.

This requirement is in harmony with the purposes of the Federal Rules of Civil Procedure. While generally pleadings should not be used to determine the merits of a claim, courts should be free to use pleading requirements as a tool to expose the existence of a fatal defect in the plaintiff's case at the outset, especially in an area of litigation like civil rights actions, in which many cases are frivolous, and the defendant is entitled not to be sued at all in the absence of a governmental policy. This is particularly true given the overwhelming burden imposed on the courts by the flood of civil rights litigation.[2]

Petitioners maintain that Rule 11 is a sufficient safeguard against frivolous filings, since it mandates an investigation and a certification by a plaintiff's counsel that the case is well grounded in fact and law. Petitioners' argument stands the question on its head. The proper issue is not whether other provisions in the Federal Rules provide the courts with other tools to address the increase in meritless filings, but whether dismissal at the

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[2] According to the Federal Judicial Workload Statistics, December 31, 1991, prepared by the Administrative Office of the United States Courts, civil rights cases, including prisoner petitions, comprised 47,986 of the 217,656 cases commenced in the federal courts during 1991, or over 22% of all cases filed.

pleadings stage is an appropriate tool to address the problem, and whether, under the facts of this case, dismissal was proper.

Moreover, Rule 11, while certainly one useful tool in controlling frivolous filings, is not a cure-all. It is of limited use against pro se litigants (who comprise a substantial percentage of civil rights plaintiffs), because of the district courts' natural reluctance to use it against those persons who are arguably less familiar with the rules of court. Second, monetary sanctions are little or no deterrent to indigent litigants. Third, and most importantly, sanctions are, by definition, remedial in nature, and do not operate to prevent abuses before they occur. Douglas A. Blaze, *Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation*, 31 Wm. & Mary L. Rev. 935, 988 (1990). Thus, Petitioners' suggestion that Rule 11 eliminates the need for careful and prudent use of Rule 12(b) dismissals is less than compelling.

One might also argue that summary judgment is a preferable alternative to dismissal at the pleading stage. Certainly, summary judgment is a useful way to dispose of claims prior to trial, and its importance as a pre-trial procedural device cannot and should not be minimized. The availability of summary judgment does not necessarily lead to the conclusion, however, that it is the only mechanism to dispose of cases in which the plaintiff cannot even allege facts supporting his cause of action. Indeed, in the case at bar, resort to summary judgment would have produced the same result, but at a greater cost to Respondents and their taxpayers. Petitioners, who could not allege any facts to support the existence of a

municipal policy, would have been equally unable to do so on summary judgment. Thus, the only net effect of such an approach would have been to needlessly delay the inevitable, and to diminish Lake Worth's right to immunity from suit.

Petitioners complain that they should have been allowed to conduct discovery to gather evidence to support their claim. This argument cannot withstand careful scrutiny. First, Petitioners had ample time to conduct discovery from Lake Worth. The case against Lake Worth had been on file for seven months, and no protective order had been entered prohibiting such discovery against Lake Worth. (In fact, Petitioners took depositions of two Lake Worth officers prior to dismissal, and could have taken more had they so chosen).

Secondly, Petitioners were obligated to do an investigation before filing, and had several means to do so available. For example, they could have searched news accounts to determine if there were similar incidents in Lake Worth. Alternatively, they could have utilized the Texas Open Records Act, Tex. Rev. Civ. Stat. Ann. art. 6252-17a (Vernon Supp. 1992), which permits access to government records. The Texas Open Records Act provides a very effective mechanism for plaintiffs to obtain, prior to filing suit, public documents which may reflect the existence of a municipal policy.[3]

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[3] Contrary to Petitioners' intimations, the Texas Open Records Act is a very effective mechanism to obtain copies of almost any record within the possession of a governmental entity. The "litigation exception" to the Open Records Act noted by Petitioners may only be asserted after a lawsuit has been

Though Petitioners could have conducted a pre-filing investigation, and had a duty to do so under Rule 11, they clearly did not do so. Petitioners' position appears to be that they have an inherent right to plead a cause of action for which they have no factual basis to believe is true, based upon a single isolated incident, on the off-chance that they will be able, through a discovery fishing expedition, to find other incidents and thereby raise an issue as to the existence of an unconstitutional policy.

In fact, Petitioners' argument is exactly why dismissals should be granted early, especially in civil rights cases. Lake Worth is entitled to sovereign immunity. That immunity extends to immunity from the costs and burdens of suit, including unnecessary participation in motions or discovery. That immunity will be completely subverted and destroyed if a plaintiff can subject a city and its taxpayers to the costs and burdens of litigation based purely on an unsubstantiated allegation of the existence of a policy, which allegation is devoid of any factual support whatsoever. For example, this Court, in considering the similar qualified immunity available to many individual § 1983 defendants, has recognized that immunity from suit includes immunity from discovery:

> Unless the plaintiff's allegations state a claim for violation of clearly established law, a

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filed or if litigation is reasonably anticipated. *Heard v. Houston Post Company*, 684 S.W.2d 210 (Tex. Civ. App. – Houston [1st Dist.] 1984, writ ref'd n.r.e.). The Texas Attorney General has therefore ruled that the litigation exception does not allow a municipality to withhold basic facts, the release of which would not impair the governmental body's legal strategy. Open Records Decision No. 511 (1988).

> defendant pleading qualified immunity is entitled to dismissal *before the commencement of discovery*. . . . *Harlow* thus recognized an entitlement not to stand trial *or face the other burdens of litigation*, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law. The entitlement is an *immunity from suit* rather than a mere defense to liability; and *like an absolute immunity*, it is effectively lost if a case is erroneously permitted to go to trial.

Mitchell v. Forsyth, 472 U.S. at 526 (emphasis added). Applying this philosophy that one of the purposes of immunity is to protect governments from "broad ranging discovery" that can be "peculiarly disruptive of effective government, *immunity questions should be resolved at the earliest possible stage of a litigation.*" *Anderson*, 483 U.S. at 646 n.6 (emphasis added) (quoting *Harlow*, 457 U.S. at 818). Any other course of action effectively eviscerates the important functions and protections of official immunity. *Elliott*, 751 F.2d at 1476. The approach suggested by Petitioners would permit cities to be held hostage as captives in litigation, and would allow plaintiffs to extort settlements even on patently meritless claims, or to subject cities to extensive litigation in the blind hope of turning up some evidence to support the claims made. *Strauss*, 760 F.2d at 768.

This Court has previously recognized the dangers inherent in such misuse of the courthouse in the area of securities litigation. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975) (upholding the *Birnbaum* rule requiring a person to be a purchaser in order to maintain

an action for violation of the Securities Act of 1933). While the type of litigation was obviously different, the evil of a lawsuit brought solely for settlement value is exactly the same. Moreover, this Court recognized that the danger of abuse is enhanced due to the liberal discovery provisions of the Federal Rules:

> [T]o the extent that [the discovery provisions permit] a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence, it is a social cost rather than a benefit.

Id. at 741. In the face of this compelling logic, Petitioners maintain that they are legally entitled to go on a fishing expedition and troll the waters of the courthouse, casting their nets indiscriminately in the hope of "catching a big one." Unfortunately, such a rule would also result in the overburdening of the judicial system and the inconveniencing of numerous parties against whom the plaintiff has no colorable claim, who are then put to the expense of needlessly defending a case and responding to discovery while the plaintiff determines whether he has a case or not. Such a rule would not do "substantial justice," which is the stated goal of Rule 8. Dismissal of Petitioners' claim against Lake Worth was warranted, and should be affirmed.

6. The holding of the Fifth Circuit does not violate the Rules Enabling Act, 28 U.S.C. § 2072.

Petitioners' argument that the Fifth Circuit's holding violates the Rules Enabling Act is based upon their

conclusion that some meritorious claims will be affected. Petitioners cite no evidence or authority in support of this assertion, but even were that true, the decisions of this Court construing the Rules Enabling Act clearly demonstrate that the Petitioners' argument has no merit.

The Rules Enabling Act provides that no rule of procedure shall "abridge, enlarge or modify" any substantive right. Petitioners argue that the Fifth Circuit's ruling deprives them of their right to discovery. It is axiomatic that discovery rights are not substantive in nature, and therefore cannot be a basis for a Rules Enabling Act challenge, since the Rules Enabling Act prohibits modification only of substantive legal rights. Petitioners also maintain that because they could not do discovery (which assertion, with regard to Lake Worth, is patently inaccurate), they could not plead the elements of a claim and so were deprived of their right to such. Essentially, Petitioners argue that the Court must apply an outcome-determinative test – that if the rule of procedure arguably affects the result of the litigation, then it is invalid. This argument is meritless. Every rule of procedure is potentially outcome determinative in that a failure to comply with it can affect the outcome of the litigation. For this reason, this Court has never applied an outcome determination analysis in addressing a Rules Enabling Act challenge in a case arising pursuant to a federal substantive right. *See, e.g., Hanna v. Plumer*, 380 U.S. 460, 468-69 (1965). Rather, this Court has fashioned a two step test to determine a rule's validity under the Rules Enabling Act. First, the court must ask "whether a rule really regulates procedure – the judicial process for enforcing rights and duties recognized by substantive

law and for justly administering remedy and redress for disregard or infraction of them." *Hanna*, 380 U.S. at 464; *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941). A rule regarding pleading requirements obviously meets this criteria, so the rule in question passes the first test. The second prong of the analysis is that if the rule is one that regulates procedure, then the fact that it only incidently affects substantive rights does not render it invalid. *Business Guides, Inc. v. Chromatic Communications Enter., Inc.*, 111 S. Ct. 922, 934 (1991); *Burlington Northern Railroad Co. v. Woods*, 480 U.S. 1, 5 (1987); *Hanna*, 380 U.S. at 465. Any effect on Petitioners' substantive rights was wholly incidental, and so does not violate the Rules Enabling Act.

7. Any result other than dismissal would itself violate the Rules Enabling Act.

Not only does the dismissal in this case not violate the Rules Enabling Act; in fact, any other result would itself violate the Rules Enabling Act because Lake Worth's substantive legal right to sovereign immunity would be destroyed. As previously discussed, the absolute immunity afforded Lake Worth is a substantive legal right that includes not only immunity from liability, but also immunity from suit, which right can only be overcome if an unconstitutional municipal policy is involved. To force Lake Worth to litigate a claim without the existence of any municipal policy being shown by Petitioners thus abridges Lake Worth's substantive legal rights, specifically, immunity from suit. *See, e.g., Elliott*, 751 F.2d at 1479; *Morrison v. City of Baton Rouge*, 761 F.2d 242, 243-44 (5th Cir. 1985).

Nor can the effect of refusing to dismiss the case be termed an "incidental" effect on Lake Worth's substantive legal right to immunity from suit. The substantive right at issue is the right to be free from procedural burdens inherent in litigation. To subject Lake Worth to these procedural burdens, including discovery and motion practice, rips a gaping hole in the very fabric of the immunity shield, based not upon a court ruling, nor even upon factual allegations raising the issue of the existence of a municipal policy, but upon the vague, conclusory statement by a plaintiff tracking the "magic words," unsupported by any factual allegations whatsoever showing the existence of the required policy.

The provisions of Rule 8 are not inconsistent with this requirement. If the Rules of Civil Procedure can be construed using their plain meaning to avoid a conflict with substantive law, so as to avoid invalidity under the Rules Enabling Act, they should be so construed. *Hanna*, 380 U.S. at 465; *Sibbach*, 312 U.S. at 11, 14. The broad language of Rule 8 can be interpreted consistently with the Rules Enabling Act to require that in a case brought under § 1983, in which a plaintiff seeks to overcome the existence of sovereign immunity by showing the existence of a municipal policy sufficient to create liability, a plaintiff must plead sufficient facts to raise an issue as to the existence of such a policy.

8. Even if the Fifth Circuit erred in dismissing the Complaint, summary judgment for all defendants was still warranted.

Even assuming for purposes of argument that dismissal of the Complaint was inappropriate, the order of

the district court is equally sustainable based upon the alternative relief granted by summary judgment. Petitioners offered no evidence in response to the motion for summary judgment that the actions complained of were taken pursuant to any governmental policy or custom. Petitioners had ample time to discover and come forward with such evidence, as determined by the district court. Hence, the Complaint was properly dismissed in any event, and further review of the grounds for dismissal is not warranted.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Fifth Circuit affirming the dismissal of Petitioners' First Amended Complaint as to Respondent Lake Worth should be affirmed.

Respectfully submitted,

/s/ Wayne K. Olson
TIM G. SRALLA
WAYNE K. OLSON*

Members of the Firm of:
FIELDING, BARRETT & TAYLOR
8851 Highway 80 West,
Suite 300
Fort Worth, Texas 76116-6041
Telephone: (817) 560-0303
Facsimile: (817) 560-3953

Attorneys for Respondent
City of Lake Worth, Texas

*Attorney of Record